the trusts of the Will had not been terminated and that there were difficult matters of law concerning the proper destination of the accumulated income of the trust which exceeded $1,000,000.

Before the commencement of the hearing defendants' counsel indicated to the court that a preliminary objection would be taken to the application in that all the beneficiaries had not been included in the action.

Counsel for defendants submitted to the court that the question before the court was whether the interest earned by the trusts were contingent or vested and that all classes of persons who may be entitled to distribution under intestacy should be represented. Counsel argued that the trustees must be protected by order of court.

Counsel for applicants however submitted that of the known beneficiaries who were not parties three of them were aware of the proceedings and were not interested in the trust. Counsel indicated that as far as the fourth was concerned Oei Sioe Nio could be served.

Having considered the preliminary objection, the court is of the view that there is no merit in the preliminary objection. Gladys Yeap, Nancy Yeap and Julia Yeap by the documents they have filed in court have made it abundantly clear that they are fully aware of the proceedings and have no interest in the trust. In the circumstances there would be no necessity for them to be represented in the proceedings by the trustees or any one else. They are *sui juris* and they cannot be heard later to complain that the trustees had not looked after their interest. As regards Oei Sioe Nio, as indicated by counsel for applicants she can be served.

Counsel for defendants also suggested the possibility of there being adopted children. Adopted children can only be entitled if legally adopted under the Adoption Ordinance by the testator. If there were any adopted children adopted by the testator, their existence would be known by this time considering the status of the testator and the time of death. Hence the trustees need not be appointed to represent such an unknown or unnamed class.

Under the circumstances the preliminary objection is overruled. Oei Sioe Nio should be served with all the proceedings. Originating Summons to proceed to hearing.

Solicitors: *Lim Ewe Hock; Gan Teik Chee; Sharikat Goh Guan Hoe; Presgrave & Matthews.*

HASHIM BIN MOHAMED ZAIN & ANOR. v. WAN HONG WAI & ORS.

[O.C.J. (Mohamed Azmi J.) April 2, 1975]
[Kuala Lumpur — Civil Suit No. 589 of 1974]

Mining — Mining permit — Dispute relating to validity of mining agreement — Application for interim order to renew mining permit — Whether fair and equitable that application be granted.

The plaintiffs were the joint lessees of mining land and had entered into a mining agreement with the third to seventh defendants. The first and second defendants were attorneys of the first and second plaintiffs. The plaintiffs brought an action against the first and second defendants alleging that the power of attorney given to them was obtained by fraud. The other defendants applied to be joined in the action.

The third to seventh defendants applied for an *interim* order that the plaintiffs or their attorneys execute a permit to mine in their favour under the mining agreements.

Held: the continuation of the mining operations would in no way prejudice the rights of the parties and irreparable damage would be caused to the applicants if the permit to mine is not renewed. Having regard to all the circumstances it was fair and equitable that the application be granted.

[Editorial Note: An appeal against this decision to the Federal Court was withdrawn and struck out on November 10, 1975, vide F.C. Civil Appeal No. 59 of 1975].

Cases referred to:-

(1) *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173.

(2) *Australian Blue Metal Ltd.* v. *Robert Frank Hughes & Ors.* [1962] 3 W.L.R. 802.

(3) *Martin-Baker Aircraft Co. Ltd. & Anor.* v. *Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556.

CIVIL SUIT.

Roger K. H. Tan for third to seventh defendants/applicants.

Mohamed Azam Shuja (*Lin Soo Meng* with him) for the first plaintiff/respondent.

Au-Yong Khuen for the second plaintiff/respondent.

J. G. Bernatt for the first and second defendants/respondents.

Mohamed Azmi J.: This is an application by Summons-in-Chambers on the part of the third, fourth, fifth, sixth and seventh defendants (hereinafter referred to as "the applicants") for an order that the first and second plaintiffs or, alternatively, their respective attorneys, the first and second defendants, execute a permit to mine in their favour for the period February 20, 1975 to February 19, 1976 in respect of mining land held under Mining Certificate No. 1/74, Daerah Pekan, Mukim Endau, Sungai Tempat A Pahang, and other ancillary reliefs. The case came up in Chambers on February 24, 1975 before Gill C.J. who adjourned it into open court on a date to be fixed. The case came up before me on April 2, 1975; and after hearing arguments, I allowed the application with a further order that pleadings in this case be closed within one month and for an early trial. The first plaintiff and defendant Nos. 1 and 2 have now appealed against the said orders.

The facts leading to the present application are as follows. The two plaintiffs are the joint lessees of mining land under Mining Certificate No. 1/74 in the Mukim of Endau, Daerah Pekan, containing an area of approximately 397 acres. On October 16, 1973 they entered into a mining agreement with the third and fourth defendants whereby they promised

to grant to the two defendants full licence to extract tin ore from the said land for a period of five years from the date of issue of the mining certificate. (See Exhibit A attached to affidavit of Leong Kam Sang, the third defendant, dated September 12, 1974). This agreement was executed by the first plaintiff personally and the second defendant as attorney of the second plaintiff, and at that time although the mining lease had been approved to the plaintiffs the mining certificate was yet to be issued. For reasons which I need not mention here, this agreement was superseded by a subsequent agreement dated February 20, 1974. (See Exhibit D attached to the same affidavit mentioned above). On the same date, pursuant to this second agreement, the plaintiffs also issued to the two defendants and the fifth defendant for and on behalf of Tong Lee Tin Mines Company (of which all the present applicants are partners) a permit to mine the said mining land. The relevant provision of the second agreement as far as the present application is concerned, provides that in considerations of the sum of $1 paid to the plaintiffs by the third, fourth and fifth defendants, and of the payment of tribute as set forth in the agreement, the plaintiffs granted licence and authority to the three defendants all the said mining land for the term of one year commencing on February 20, 1974 and terminating on February 19, 1975 *and for such renewal or renewals thereof as the three defendants may request in writing but not more than five years, and subject to the provisions of the Mining Enactment and to the conditions, restrictions and exceptions contained in the agreement.* The permit to mine also provides that, pursuant to the above agreement, the plaintiffs granted to the three defendants licence and authority to enter upon the said mining land and to work the same for mining subject to the express conditions contained in the mining certificate. It is also provided that the licence and authority *is granted for one year commencing on February 20, 1974 and expiring on February 19, 1975 and is renewable for a further term of four years.* (See Exhibit 'LKS 1' annexed to the affidavit of Leong Kam Sang, the third defendant, affirmed on February 7, 1975).

It should be noted that this second agreement and as well as the permit to mine were executed by the first and second defendants as attorneys of the first and second plaintiffs respectively vide Power of Attorney No. 1455/71 in respect of the first defendant and No. 1575/71 in respect of the second defendant. To cut the story short, the present applicants commenced mining operation soon after the execution of the second agreement and the permit to mine, and not unnaturally considerable sums of money were invested by them for the due operation of the tin mine. Although the two documents were executed by their attorneys, there is no evidence to suggest that the plaintiffs did not know of the mining operation being carried on by the applicants on their land as from about February 1974.

However, on July 20, 1974, the plaintiffs filed a Writ of Summons against their respective attorneys, the first and second defendants, alleging that the two powers of attorney granted to them were obtained by means of fraud and misrepresentation, and, as such, they claimed for a declaration that the purported irrevocable Powers of Attorney Nos. 1455/71 and 1575/71 are null and void, and also for an injunction to restrain all persons purporting to act under the authority of the two defendants from dealing with the plaintiffs' properties. On June 4, 1974 vide ex-parte Summons-in-Chambers, the plaintiffs obtained an interim injunction, the effect of which was to restrain the first and second defendants and as well as the present applicants from mining operation on the plaintiffs' land. Confronted by this order, the present applicants (defendant Nos. 3 to 7) filed Summons-in-Chambers dated September 16, 1974, by which they successfully applied to set aside the interim injunction in so far as it restrained them from mining or carrying on mining operation in respect of the said land. They also obtained an order that they should be joined as defendants in the civil suit filed by the plaintiffs, and also to pay the 10 per cent tribute payable under the second agreement into court until final disposal of the suit.

As can be recalled, the permit or licence to mine expired on February 19, 1975. Hence, the present application for renewal of the permit for another year up to February 19, 1976. I allowed this application on the following grounds. Firstly, in my view, from the terms of the second agreement and the permit to mine, it is the intention of the parties that the applicants should be given the licence to mine the land for a maximum period of five years provided there is no breach of the terms of the agreement. Therefore, the agreement does not merely confer a licence at will and, in my judgment, the principles enunciated in *Winter Garden Theatre (London), Limited* v. *Millennium Productions Limited*,[1] *Australian Blue Metal Ltd.* v. *Robert Frank Hughes & Ors.*[2] and *Martin-Baker Aircraft Co. Ld. & Anor.* v. *Canadian Flight Equipment Ld.*[3] do not apply in the present case. Secondly, the second plaintiff, who is the joint owner of the mining land, does not oppose the present application; and, as such, the second defendant as his attorney cannot possibly oppose the wishes of his principal. In the event, it is only the first plaintiff and his attorney, the first defendant, who object to the application, although there is now a dispute between them as to the validity of the power of attorney. Thirdly, in my view, the alleged breach of the terms of agreement, particularly regarding clause 9B of the second agreement, even if proved, does not go to the root of the contract and does not entitle the first plaintiff or his attorney to rescind the contract. To my mind, the remedy for such breach will be in damages. In any event, whether the notice of termination of the agreement dated February 10, 1975 given by the first and second defendants is effectual must necessarily depend on the validity of their position as attorneys of the plaintiffs. Until the question is decided, the mining agreement should not be considered as having been rescinded. Fourthly, the continuation of the mining operations on the mining land will in no way prejudice the rights of any of the parties to the civil suit filed by the plaintiffs, and that irreparable damage will be caused to the applicants if the permit to mine is not renewed under the contract, should the plaintiffs claim against their respective attorneys failed, although it would then be open for the first and second defendants to take whatever action against the

present applicants if, indeed, they are entitled to terminate the agreement as alleged. Finally, should the plaintiffs succeed in their claim and obtain a declaration that the two irrevocable powers of attorney are null and void, it may be argued that the mining agreement and the permit to mine, on which the rights of the present applicants rest, will be void and of no effect. It is, however, open to the applicants in any future proceeding to show that they have no notice of the fraud perpetrated by the attorneys of the plaintiffs. As stated earlier on, before the dispute arose between the plaintiffs and their attorneys, the plaintiffs knew at all material times that the applicants were mining their land under the mining agreement and they did in fact receive tributes as provided for in the said agreement.

Having regard to all the circumstances, in my view, it is fair and equitable that the present application be granted, and that the 10 per cent tribute payable by the applicants to the plaintiffs under the mining agreement be paid into court until final disposal of the suit involving the question of validity and authority of defendant Nos. 1 and 2 to act as attorneys for the two plaintiffs. I also order that pleadings in this case be closed within one month from date hereof, after which, an early date for trial should be fixed by the Senior Assistant Registrar.

Order accordingly.

Solicitors: *Allen & Gledhill; Azam, Malek & Soh; K S. Tan & Co.; Baharuddin, Bernatt, Tan & Kerr.*

KHOO CHIN INN & ANOR. v. RELIANCE ENTERPRISE SDN. BHD. & ORS.

[O.C.J. (Ajaib Singh J.) April 23, 1975]
[Seremban — Civil Suit No. 12 of 1975]

Practice and Procedure — Discontinuance — Leave of the court — R.S.C., 1957, O.26 r.1, O.38 r.20.

Practice and Procedure — Order of court — "Until the final determination of this suit" — Construction.

The second and third defendants applied for an order that the plaintiffs' purported discontinuance of their action against the defendants by notice of discontinuance without leave of the court was in breach of O.26 r.1.

Held: leave of the court for discontinuance of an action is necessary only where a plaintiff after the receipt of defence takes any other proceedings in the action save an interlocutory application.

Cases referred to:-

(1) *Meerut* v. *Lakshmi Chand & Ors.* A.I.R. 1963 Supreme Court 677.

(2) *Tan Kim Leng & Anor.* v. *Chong Boon Eng & Anor.* [1974] 2 M.L.J. 151.

(3) *Fox* v. *Star Newspaper Company* [1898] 1 Q.B. 636.

CIVIL SUIT.

Edgar Joseph Jr. (*K. Gunaretnam* with him) for the applicants.

S. F. Leow for the respondents.

Ajaib Singh J.: This is an application by the second and third defendants for an order that the plaintiffs' purported discontinuance of their action against the defendants by notice of discontinuance without leave of the court is in breach of Order 26 rule 1 of the Rules of the Supreme Court. There is also a prayer for leave to file a counterclaim. The application is made by way of summons-in-chambers and filed together with the summons is an affidavit dated March 7, 1975 affirmed by Mr. K. Gunaretnam solicitor for second and third defendants.

The circumstances leading to the present application are as follows. On January 20, 1975 the plaintiffs issued a writ of summons seeking declarations to the effect that resolutions passed by the first defendant company at its annual general meeting on December 27, 1974 appointing the second and third defendants as directors of the company were *ultra vires* the company, illegal, void and of no effect. The plaintiffs also claimed for an order of injunction restraining the second and third defendants and each of them from acting as directors of the first defendant company. On January 23, 1975 the plaintiffs made an interlocutory application by notice of motion for an order that the second and third defendants be restrained from acting as directors of the first defendant company. This application, however, was not heard at all because before the date set for its hearing had arrived the plaintiffs wholly discontinued their action against the defendants. On February 3, 1975 the plaintiffs, who were entitled to make a requisition for the holding of an extraordinary general meeting under section 144(1) of the Companies Act 1965, convened an extraordinary general meeting of the company to be held on March 6, 1975 under the provisions of section 144(3) of the Companies Act after the directors of the company had failed to proceed to convene the meeting within twenty-one days after the date of the deposit of the requisition by the plaintiffs. The plaintiffs also gave notice of their intention to move resolutions at that meeting for the removal of the second and third defendants as directors of the company and for the reduction of the number of directors to five.

Meanwhile the second and third defendants had filed a joint defence on February 18, 1975 and upon being notified of the convening of the extraordinary general meeting to be held on March 6, 1975 the second and third defendants applied by notice of motion dated February 24, 1975 for an order that the plaintiffs be restrained whether by themselves or by their servants or agents or otherwise from moving any resolution for the removal of the first and second defendants as directors of the company and secondly from moving any resolution that the number of directors of the company be reduced to five. An order in terms of this motion was made by this court on March 4, 1975 and on the same day the plaintiffs promptly filed a notice of discontinuance wholly discontinuing their action against the defendants under Order 70 rule 1 of the Rules of the Supreme Court the Hence this application by the second and third defendants that the discontinuance was in breach of Order 26 rule 1.

The first plaintiff has filed an affidavit with reference to the summons-in-chambers wherein he has alleged that the application by the second and third defendants is bad on the grounds that it is not supported by a proper affidavit affirmed by either of the applicants, that the affidavit affirmed by Mr. K. Gunaretnam does not disclose that he is duly authorised to make the affidavit on behalf of the applicants and that no notice has been given by the applicants of their intention to use any affidavit as is required under Order 38 rule 20 of the Rules of the Supreme